IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 6, 2009 Session

DONNA LASHEA MCMEEN JONES v. DAVID PATRICK MCMEEN

Appeal from the Chancery Court for Dickson County
No. 8188-03 Robert E. Burch, Judge

No. M2008-00699-COA-R3-CV - Filed August 26, 2009

Father filed a petition for contempt and to modify the parenting plan based on Mother's noncompliance with court-ordered visitation. Mother filed an answer and counterpetition for contempt and modification of the parenting plan based on Father's alcohol consumption. The chancellor found Mother in criminal contempt of court for willfully violating the visitation order and sentenced her to serve 24 hours in jail; Father was found in civil contempt for consuming alcohol around the children and ordered to pay a fine in the amount of fifty dollars. The parenting plan was affirmed as previously modified and Father's request for attorney fees was denied.

Because the proceeding did not comply with the notice requirements of Tenn. R. Crim. P. 42(b) and Mother was not advised of the constitutional protections afforded criminal defendants, we reverse Mother's criminal contempt conviction. We find no abuse in the trial court's discretion with respect to its modification of the parenting plan or award of parenting time but have determined Father is entitled to an award of attorney fees caused by Mother's interference with visitation. We remand to the trial court for calculation and award of attorney fees incurred to enforce the parenting plan and visitation.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed in Part, Affirmed in Part, Remanded

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Jerred A. Creasy, Dickson, Tennessee, for the appellant, Donna LaShea McMeen Jones.

Clifford K. McGown, Jr., Waverly, Tennessee, for the appellee, David Patrick McMeen.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Donna LaShea McMeen Jones ("Mother") and David Patrick McMeen ("Father") were divorced on August 5, 2003, on the grounds of irreconcilable differences. The parties had two minor children; S.E.M., born October 13, 1993, and D.P.M., born October 26, 1998; and entered into an agreed parenting plan naming Mother the primary residential parent and providing Father with approximately three days of parenting time each week depending on his work schedule. Father worked the night shift so the original parenting plan provided that Mother should have the children "in the event Father is unable to have the children reside with him due to his work schedule[.]" Both parties agreed to refrain from drinking alcohol in excess and from making derogatory remarks about each other while the children were in their care. Each parent was given the right of first refusal to keep the children when the other parent was unable to do so. For nearly three years, the parties operated under this parenting plan.

On June 16, 2006, Father filed a petition for contempt and to modify the parenting plan claiming a material change in circumstances based in part on a particular instance when Mother interfered with Father's parenting time. Father described the incident in the petition as follows:

> On Sunday, June 11, 2006, [Father], as was his normal practice, went to pick the children up at their Mother's home. . . . [Mother] had kept the children the previous week. [Mother] had previously informed [Father] that she was going to go on vacation the week of June 4, 2006 as provided for in the existing Parenting Plan. [Father] had not, therefore, had the children the previous week.
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> When [Father] pulled into [Mother's] driveway, a Deputy Sheriff with the Dickson County Sheriff's Department pulled in behind him. [Father] went to the front door of the Jones residence and asked for his children. [Mother] informed [Father] that "the children are afraid of you" and stated that they would not be permitted to leave with [Father]. The Deputy Sheriff then advised [Father] that there was nothing that he could do but leave.
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> [Father] left without the children.
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> On Monday, June 12, 2006, [Father] was contacted by Detective Stacee Patterson of the Dickson County Sheriff's Department and was asked to come to the Dickson County Sheriff's Department to discuss his children. [Father] went to the Dickson County Sheriff's Department on Tuesday, June 13, 2006, and met with Detective Patterson and Stephanie Ellis, apparently an investigator with the Department of Children's Services. During the course of that interview [Father] was

accused of having had inappropriate sexual contact with his children, something that has not occurred.

[Father] has had no contact with his children since May 31, 2006.

Father maintained that Mother's refusal to allow him to visit with his children constituted willful and deliberate contempt of the orders of the court. He also claimed that Mother consistently spoke negatively about Father to the children in direct violation of the parenting plan.

Father filed a second petition for contempt and for modification on July 17, 2006; Mother had not responded to the first petition or submitted any filing with the court and had not permitted Father to see the children. On August 7, 2006, Mother filed an answer to Father's petition and filed a counter-petition for contempt and to suspend Father's visitation. A temporary hearing took place the next day before Chancellor Leonard Martin. Father and Stephanie Ellis, a child protective services caseworker with the Department of Children's Services (DCS), testified about the initial report of Father's inappropriate conduct, the investigation, and the disposition of that report. Father denied any wrongdoing and cooperated voluntarily with DCS at all times. Ms. Ellis interviewed both children, Mother, and Father; DCS determined that the allegations were unfounded and closed the case. The court ordered that visitation with Father resume and continue according to the terms of the parenting plan. The trial court specifically found that the allegations against Father "are not credible and are not to be believed" and affirmatively found that "there was no inappropriate conduct of any sort by [Father] and that the allegations concerning the children are untrue and without merit."

Thereafter, while the parties engaged in discovery, Father's work schedule changed, requiring him to work Sunday, Monday, and Tuesday nights instead of Wednesday, Thursday, and Friday nights. Mother did not agree to change the parenting schedule, and on April 7, 2007, Father filed a motion to amend the parenting plan on an interim basis. The trial court heard the matter and ordered on April 27, 2007, that the parenting plan be modified to accommodate Father's work schedule effective immediately.[1]

The final hearing on the cross petitions for contempt and modification of the original parenting plan was held on October 29, 2007, before Chancellor Robert E. Burch. Again, Father and Ms. Ellis testified about events leading up to and following the children's allegations and DCS's investigation and findings. Father further testified that he was denied 68 days of parenting time as a result of Mother's interference. He testified to problems he had contacting Mother by phone and some behavioral changes he noticed in the children. According to Father, time with the children was awkward when he resumed the parenting schedule in August but things were getting better, especially with his son. Father also presented witness testimony that Mother disparaged Father in front of the children and caused a scene at S.E.M.'s softball practice by keeping her away from Father.

[1] The transcript of this proceeding is not part of the record on appeal.

Mother recounted the May 2006 incident and her actions in response to the allegations against Father. Mother stated that she called the police and contacted an attorney; DCS contacted her shortly thereafter. Mother claimed she was advised by either a detective or DCS representative not to allow Father near the children and that language in the parenting plan permitted her actions if she feared for the health or safety of her children. She stated that she believed the children and fears for their safety while in Father's care. Mother testified that both S.E.M. and D.P.M. made good grades and had not exhibited any behavioral problems but admitted on cross examination that her daughter, S.E.M., has a temper. S.E.M.'s therapist and counselor, Lynette Robertson, testified that S.E.M. had an adjustment disorder with a depressed mood that developed into post traumatic stress disorder. S.E.M. also took the stand and testified that she wanted to live with Mother and did not feel safe around Father because he drank beer around them.

At the close of the proof, Chancellor Burch made an independent finding that the sexual abuse did not occur, in concurrence with Chancellor Martin's findings in the temporary hearing, but that Mother had a duty to report the allegation. The court opined that "the primary residential parent has to be trusted with duty to carry out the orders of this court" or else lose that right. The chancellor then found that "the facts establish [Mother] is just clearly the superior parent" and should remain the primary residential parent. Nevertheless, the trial court found she had "an affirmative duty to approach this court in order to allow visitation to be suspended pending an investigation. She did not do this." Mother was sentenced to serve 24 hours in the Dickson County jail for contempt of court. Father was found to be in contempt for using alcohol in excess, fined fifty dollars, and ordered not to consume any alcoholic beverages within 24 hours of having the children in his care. The trial court also determined that a hearing would have been necessary even if Mother had not interfered with the parenting plan because of the nature of the allegations. Thus, each party was responsible for his/her own attorney's fees and costs were equally divided between the parties.

Mother appeals claiming the trial court erred when it held her in criminal contempt of court and sentenced her to jail and when it affirmed the residential parenting schedule as previously modified. Father appeals the denial of his request for attorney fees and asks for additional parenting time to compensate him for the time lost as a result of Mother's actions.

ANALYSIS

I. Criminal Contempt

A trial court's use of its contempt power is within its sound discretion and will be reviewed by an appellate court under an abuse of discretion standard. *Outdoor Mgmt., LLC v. Thomas*, 249 S.W.3d 368, 377 (Tenn. Ct. App. 2007). A trial court abuses its discretion when it applies an incorrect legal standard or reaches a decision against logic or reasoning that causes an injustice to the party complaining. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001).

Mother challenges the trial court's contempt finding on the grounds that she did not receive notice as required by the Tennessee Rules of Criminal Procedure. There are two types of contempt,

civil and criminal. Criminal contempt is punitive in nature for noncompliance with a court's order. *Ahern v. Ahern*, 15 S.W.3d 73, 79 (Tenn. 2000). Civil contempt is designed to coerce an individual to comply with a court's order. *Beard v. Beard*, 206 S.W.3d 463, 467 (Tenn. 2006). The parties concede the contempt citation in this case was for criminal contempt. Because the basis of the contempt charge was willful violation of a court order, Tenn. R. Crim. P. 42(b) governs.

> A criminal contempt must be prosecuted on notice as follows:
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> (1) Content of Notice. The criminal contempt notice shall:
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> (A) state the time and place of the hearing;
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> (B) allow the defendant a reasonable time to prepare a defense; and
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> (C) state the essential facts constituting the criminal contempt charged and describe it as such.
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> (2) Form of Notice. The judge shall give the notice orally in open court in the presence of the defendant or, on application of the district attorney general or of an attorney appointed by the court for that purpose, by a show cause or arrest order.

Tenn. R. Crim. P. 42(b)(1)-(2). A party charged with criminal contempt must be given "explicit notice that they are charged with criminal contempt and must also be informed of the facts giving rise to the charge." *Long v. McAllister-Long*, 221 S.W.3d 1, 13 (Tenn. Ct. App. 2006). Proper notice in compliance with Rule 42(b) should be given in the petition for contempt, and it is the duty of the trial court to ensure that the party charged has adequate notice that he or she is charged with criminal contempt. *Id.*; *Storey v. Storey*, 835 S.W.2d 593, 600 (Tenn. Ct. App. 1992).

Father's petition for contempt detailed the events and allegations that formed the basis of the relief sought and specifically requested that Mother be jailed as punishment for her "willful and deliberate contempt[.]" However, the petition did not designate the contempt as criminal. Because both civil and criminal contempt proceedings carry the possibility of incarceration, written notice must specifically charge a party with criminal contempt. *Long*, 221 S.W.3d at 13. Adequate notice requires that it is "clear and unambiguous to the average citizen." *Id.* The petition did not contain adequate notice. Even if Mother gleaned from the petition that the contempt charge was criminal since it alleged her violation of a court order, the hearing took place more than a year after the petition was filed and after Father's visitation resumed. Our review of the record reveals that at no point during the October 29, 2007 proceeding was Mother notified that she faced a criminal contempt charge. Mother was given no notice of her constitutional rights or the protections afforded her such as the presumption of innocence, her privilege against self-incrimination, or the burden of proving Mother's guilt beyond a reasonable doubt. *See Doe v. Bd. of Prof'l Responsibility*, 104 S.W.3d 465, 474 (Tenn. 2003); *Storey*, 835 S.W.2d at 599; *Crabtree v. Crabtree*, 716 S.W.2d 923, 925 (Tenn. Ct. App. 1986). The trial court did not state Mother was found guilty of criminal

contempt beyond a reasonable doubt or state what evidence supported its finding outside of its desire "to demonstrate its authority" and teach Mother a lesson.

The contempt power exists in part to ensure that parties comply with the orders of our courts, especially those who avail themselves of our judicial system. *See* Tenn. Code Ann. § 29-9-102. In this instance, however, Father's petition and the proceedings thereon did not meet the notice requirements of Tenn. R. Crim. P. 42(b). The judgment of the trial court holding Mother in criminal contempt is reversed.

II. The Parenting Plan

Next, Mother appeals the trial court's initial modification of Father's residential schedule in the parenting plan and subsequent affirmation of that modification. Mother claims the modified schedule afforded Father more time than the original plan, contradicted the trial court's findings of fact, and was against the children's best interests.

Trial courts have broad discretion in child custody determinations and in fashioning a residential parenting plan according to the facts of each case. *Eldridge*, 42 S.W.3d at 85; *Burden v. Burden*, 250 S.W.3d 899, 904 (Tenn. Ct. App. 2007). Accordingly, appellate courts are reluctant to second-guess a trial court's decisions on custody matters or parenting plans. *Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001).

The threshold issue in cases involving modification of an existing residential parenting schedule is whether a material change in circumstances occurred since entry of the previous order. *In re C.R.D.*, No. M2005-02376-COA-R3-JV, 2007 WL 2491821, *6 (Tenn. Ct. App. Sept. 4, 2007); Tenn. Code Ann. § 36-6-101(a)(2)(C). The party seeking the modification must prove a material change of circumstances by a preponderance of the evidence which can include showing "significant changes in the needs of the child over time, which may include changes relating to age; significant changes in the parent's living or working condition that significantly affect parenting; failure to adhere to the parenting plan; or other circumstances making a change in the residential parenting time in the best interest of the child." Tenn. Code Ann. § 36-6-101(a)(2)(C). In any proceeding concerning parenting plans or schedules, "the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities." Tenn. Code Ann. § 36-6-401(a). Further recognizing the detrimental effect divorce has on many children, the General Assembly expressed its intent that parenting plans foster and encourage the relationship between each parent and child unless inconsistent with the child's best interest. *Id*.

The petitions filed by Mother and Father referred to the original parenting plan. However, this plan was modified on April 27, 2007, after the trial court found it was in the children's best interest to accommodate Father's work schedule before the final hearing on the petitions for modification. The April modification gave Father parenting time from Wednesday after school or 9:00 a.m. if school was not in session until Saturday at 9:00 a.m. if Father was scheduled to work on the weekends or until Sunday at 9:00 a.m. when Father did not work on the weekends. According

to the original parenting plan entered into at the time of divorce, Father had the children from Sunday at 1:00 p.m. until school started on Wednesday every other week and from Monday at 7:00 a.m. until school started on Wednesday in the alternating weeks.

Neither Father nor Mother demonstrated that a material change in circumstances occurred since entry of the modified parenting plan on April 27, 2007. Mother remained the primary residential parent and was found to be "the superior parent" when compared with Father's casual parenting approach. Mother insists that the court erred because Father was granted more parenting time under the modified parenting plan. After comparing the original parenting plan and the modified plan, we find Mother's argument to be a distinction without a difference. At oral argument, both parties conceded that they split parenting time equally with each having 182.5 days per year, both before and after the modification. Father was granted approximately the same amount of parenting time, just on different days. We further find no evidence in the record to suggest that the parenting plan as modified was inconsistent with the best interests of the children or with fostering their relationships with Mother and Father. The judgment of the trial court is affirmed.

III. Lost Parenting Time

Father appeals the denial of his request for additional parenting time to make up for the 68 days he lost as a result of Mother's interference with the parenting plan. Because the trial court has broad discretion in its decisions on child custody and parenting time, it was free determine whether the lost time constituted a material change in circumstances or whether Father was entitled to make up the lost time. *See Eldridge*, 42 S.W.3d at 85; *Nelson*, 66 S.W.3d at 901. A parent's right to visit with his or her children is not absolute and may be restricted. *In re A.N.F.*, No. W2007-02122-COA-R3-PT, 2008 WL 4334712, *22 (Tenn. Ct. App. Sept. 24, 2008) (no Tenn. R. App. P. 11 application filed). In this case, Father was denied parenting time while DCS investigated allegations of inappropriate sexual conduct and while the petitions for contempt and modification were pending. Father cites no authority by which the trial court was required to compensate him for time lost when it found Mother acted appropriately in reporting the allegations to DCS. We find no abuse in the court's discretion.

IV. Attorney Fees

Lastly, Father claims the trial court erred in denying his request for attorney fees for proceedings in the trial court. Reasonable attorney fees incurred in enforcing support or custody or change of custody may be awarded in the court's discretion. *Huntley v. Huntley*, 61 S.W.3d 329, 341 (Tenn. Ct. App. 2001); Tenn. Code Ann. § 36-5-103(c). Instead of seeking the assistance of the court, Mother unilaterally suspended Father's visitation and caused Father to go to court in order to enforce the parenting plan. Moreover, Father had to file two petitions for contempt before Mother responded. Under the facts of this case, we find the father should have been awarded his attorney

fees in his effort to enforce court-ordered residential placement time. We remand the matter to the trial court in order to calculate the fee award associated with the enforcement of Father's visitation only. We do not award Father his attorney fees for prosecuting the petition to modify the parenting plan or for defending Mother's petition for contempt.

CONCLUSION

The judgment of the trial court with respect to the parenting plan is affirmed but is reversed as to the criminal contempt charge and the award of attorney fees. We remand for calculation of reasonable attorney fees associated with enforcing the original parenting plan. Costs of appeal are assessed against Mother, Donna LaShea McMeen Jones, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE